Supreme Court, U.S.
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CAUSE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WILLIS C. McALLISTER,
Petitioner,
vs.
TELXON CORPORATION, LARRY COLLINS AND DAN SIDES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIS C. MCALLISTER
7034 Peyton Street
Houston, Texas 77028
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PRO SE

QUESTIONS PRESENTED

Whether, Petitioner, Willis C. McAllister, Constitutional Rights to Due process (under the 5th and 14th Amendments), to a full and fair trial, were deprived by the district court and subsequently sanctioned by the Fifth Circuit Court of Appeals so as to call for an exercise of this court's supervisory power, when it:

1. Refused to determine if McAllister established a prima facie case, in accordance with the law.

2. Refused to make findings of fact and conclusions of law on all of McAllister's stated claims of action.

3. Ruled that requests for admissions,

which wrongfully exonerated respondents from Title VII violations of racial discrimination, be deemed against McAllister, after they were served by respondents, more than a year, after the court's ordered deadline.

4. Ruled that a jury trial would be held and arbitrarily without any notice or reference to any guiding rules or principles, implemented a bench trial.

5. Arbitrarily denied [McAllister's] independent motion for continuance, so that he try and substitute counsel.

6. Refused to make a ruling on McAllister's, then attorney (Gilbert Medina), third motion to withdraw from the case.

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TABLE OF AUTHORITIES

CASES

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Daniels v. Williams, 474 U.S. 327, 338-339, 106 S.Ct. 662 (1986).

Hanberry v. Lee, 311 U.S. 32, 40, 45 (1940).

Hauser v. Krupp Steel Producers, Inc., 761 F.2d 204, 207 (5th Cir.1985).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-802, 807 (1973)

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 58 L.Ed 2d 552 (1979).

Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989).

Universal American Barge, v. J-Chem. Inc ,946 F.2d 1142-1143 (5th cir.1992).

Texas Department of Community Affairs V. Burdine, 450 U.S. 248, 253, 258 (1981).

STATUTES AND RULES

28 U.S.C.A. • 1331

28 U.S.C. • 1335 (1958)

28 U.S.C.A. • 1337

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42 U.S.C.A. • 1985 (a),(b)

42 U.S.C.A. • 2000 (e)

Common Law Contracts

Common Law Torts

Federal Rules of Civil Procedure.

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OPINIONS BELOW

The relevant unpublished opinions, orders, findings of fact, and conclusions of law, whether written or given and transcribed, of the United States District Court for the Southern District of Texas appear in the Appendix to this petition, for review by this Supreme Court.

The relevant unpublished opinions, of the United States Court of Appeals for the Fifth Circuit, also appear in in the Appendix to this petition for review by this Supreme Court.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. •1254(1), which provides that the Supreme Court may review cases in the federal court of appeals by "writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree".

The district court rendered judgment on March 25,1992 and it was entered on March 30, 1992. The court of appeals entered its denial for the petition for rehearing on September 22, 1994.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the 5th and 14th amendment to the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty or property, without due process of law" and since this due clause protects rights to full and fair hearing on the issues presented ,collateral estoppel can not be applied against party as to issues not fully and fairly litigated.

STATEMENT

Petitioner, Willis C. McAllister on June 28, 1988 filed (through his then attorney of record Gilbert Medina), various claims of race discrimination, against the Telxon Corporation, Larry Collins and Dan Sides. These claims were filed in the Federal Court Southern District of Texas. Subsequent to the district court entering judgment on one of his eight claims (the other seven claims were arbitrarily not adjudicated by the district court, without reference to any guidelines or rules of law), McAllister appealed his Due Process claims to the Fifth Circuit Court of

Appeals along with other appealable procedural and substantive due process issues. The Fifth Circuit sanctioned the district Court's far departures from the accepted and usual course of judicial proceedings by erroneously affirming the district's court judgment and subsequently denied McAllister's Petition for Rehearing.

The 5th circuit court of appeals has jurisdiction over these appeals pursuant to, 28 U.S.C.A. • 1291. The district court has jurisdiction of these claims brought under 42 U.S.C.A. • 1981 pursuant to 28 U.S.C.A. • 1331, 42 U.S.C.A. • 1985 (a),(b) pursuant to

28 U.S.C.A. • 1337, 42 U.S.C.A. • 2000 (e) pursuant to 28 U.S.C.A. • 1343 28 U.S.C.A. • 1343, Common Law Contracts and Common Law Torts.

REASONS FOR GRANTING THE PETITION

The touchstone of due process is protection of the individual against arbitrary actions of government, by requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," in that it serves to prevent governmental power from being "used for the purpose of oppression".

In addition, the Fifth circuit opinion sanctions the district court's far departure from the usual course of judicial proceedings so as to call for an exercise of this court's supervisory power. The Fifth Circuit has decided

important federal questions which conflict with the decisions of this Court.

To not grant this petition would trivialize centuries-old principle of due process of law.

CONCLUSION

Underneath these overwhelming violations of Constitutional Rights, are findings of fact made by the district court, that proves McAllister was treated differently than white employees by the managers at Telxon Corporation. Findings of fact # 10, # 12, # 13, # 22, # 26,# 38, # 41 and # 45 clearly shows that McAllister was the victim of disparate treatment by Telxon managers. Moreover, the district court refused to apply the law established in past rulings made by this Supreme Court of the United States. In addition, the district court refused to acknowledge Telxon's continuing

pattern of discriminatory acts that lead to the discharge of McAllister in September of 1987.

Under the law established by this Supreme court, McAllister had the right to be treated the same as white employees at the Telxon Corporation, but he was not treated the same as the white employees. McAllister had the constitutional right to Due Process at the district court, but he deprived of his constitutional rights by the district court and subsequently denied by the 5th circuit court of appeals.

Within the subsequent briefs and motions that will be filed at this court , the attorneys for the respondents will

continue their frivolous defense and lack of respect for the laws established by this Supreme court, that protect employees from racial discrimination. As practicing attorneys admitted to the bar, to uphold the law, they should be shame of themselves, for their frivolous defense and lack of respect for the laws established by the Jurist of this Supreme court.

This case is saturated with factual accounts of disparate treatment against McAllister. It is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

Simply but, over a period of two

years, Telxon managers continuously treated McAllister differently from its white employees because he is a black male, in defiance of Federal laws and the Constitution.

McAllister's, then attorney Gilbert was forced by the district court to represent McAllister, dispite McAllister's protest in open court to have another represent him and dispite Medina's three motions to withdraw from the case. Consequently McAllister was not afforded "a full and fair" opportunity to demonstrate pretext.

The district court had duty and jurisdiction over all of McAllister's

pleaded theories of Law, but tried only one, 42 U.S.C. 2000e, without reference to any reference to any guiding rules or principles. This, yet another clear violation of McAllister's Constitutional right to a full and fair under Due process law.

To say that McAllister was not a victim of intentional, disparate treatment, on many occasions, while employed at the Telxon Corporation, is simply not true.

Again, I request this Supreme Court to invoke its supervisory power to correct this gross miscarriage of justice.

APPENDIX

The relevant unpublished opinions, orders, findings of fact, and conclusions of law, whether written or given and transcribed, of the United States District Court for the Southern District of Texas appear in the Appendix to this petition, for review by this Supreme Court.

The relevant unpublished opinions, of the United States Court of Appeals for the Fifth Circuit, also appear in in the Appendix to this petition for review by this Supreme Court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2337

Summary Calendar

WILLIS C. McALLISTER, Appellant

versus

TELXON CORPORATION, LARRY

COLLINS AND DAN SIDES, Appellees

Consolidated with
No. 92-2790

Summary Calendar

WILLIS C. McALLISTER, Appellant

versus

TELXON CORPORATION, LARRY

COLLINS AND DAN SIDES, Appellees

Appeal from the United States District Court for the Southern District of Texas

(CA-H-88-2229)

Before GARWOOD, SMITH and DeMOSS,

Circuit Judges. PER CURIAM:

These are consolidated appeals by plaintiff-appellant Willis McAllister (McAllister) in his suit against defendants-appellees Telxon Corporation (Telxon), Larry Collins (Collins), and Dana Sides (Sides). McAllister, who is black, complained that he was discharged in September 1987 from his employment with Telxon because of his race, in violation of Title VII. Collins and Sides were management employees of Telxon who supervised McAllister while he was employed there. Following a four day bench trial in February 1992, the district court judgment for Telxon,

Collins and Sides was entered March 30, 1992, and McAllister filed his notice of appeal therefrom April 28, 1992 (our cause No. 92-2337).

On May 5, 1992, McAllister filed in the district court a motion for the appointment of counsel and on May 18 ,1992, he filed in the district court an amended motion for appointment of counsel; by order dated June 24, 1992, the district court denied the motion and amended motion; on July 6, 1992, McAllister filed in the district court a motion for reconsideration of the June 24, 1992, the district court denied the motion for reconsideration. On October 6, 1992, McAllister filed his notice of

appeal from the September 25, 1992, (our cause No. 92-2790).

McAllister's submissions on appeal demonstrate no reversible error, and we affirm.

The district court detailed findings of fact and conclusions of law, which plainly exonerate defendants from Title VII violation of racial discrimination as to McAllister. The district court found , inter alia, "...even if McAllister established a prima facie case, Telxon, Collins and Sides articulated legitimate, nondiscriminatory reasons for his discharge. The legitimate, nondiscriminatory reasons include

unsatisfactory job performance, unprofessional behavior and insubordination... The Court finds that McAllister failed to prove by a preponderance of the evidence that the legitimate, nondiscriminatory reasons offered by Telxon, Collins and Sides were a pretext for any unlawful purpose." The district court's findings, which preclude any recovery by McAllister on any pleaded theory, are amply supported by the trial evidence, and McAllister has not demonstrated that they are clearly erroneous.

McAllister's other complaints in appeal No. 92-2337 are clearly without merit. His claim that he was

entitled to a jury trial under "[t]he Civil Rights Act of 1991" is without merit, for the events complained of took place prior to 1988, See Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994). In any event, McAllister never requested a jury trial in the district court. See Fed. R. Civ. p. 38 (d).

Nor did the district court abuse its discretion in overruling McAllister's counsel's motions to withdraw and McAllister's motion for continuance in order to try to find substitute counsel. McAllister filed this suit, was filed through counsel, in June 1988. After the case had been set for trial for February 25, 1992,

McAllister's counsel, on January 21, 1992, and again on February 20, 1992, filed motions to withdraw, and McAllister sought a continuance to attempt to find new counsel. In ruling on the January 21 motion-McAllister's motion for continuance was denied at the sametime-the district court stated that it "would entertain a motion for substitution that would not delay trial, but neither Medina [McAllister's counsel counsel] nor McAllister have attempted to find substitute counsel." As to the second motion to withdraw, the district court determined that "[s]ome of Medina's concerns have been ongoing since the filing of the complaint; yet,

the motions to withdraw were filed on the eve of trial. While the court would have entertained a timely motion for substitution, the court finds that, in the interest of justice and judicial economy, the motion should be denied." Neither motion to withdraw presented grounds which compelled or required withdrawal, and under the circumstances no abuse of discretion by the district court is demonstrated as to the motions to withdraw and the motion for continuance.

McAllister's various complaints about scheduling demonstrate no abuse of discretion or prejudice (e.g., McAllister complains of the late

filing of a motion for summary judgment, which was never ruled on). As to the request for a admissions, it does not appear that McAllister was thereby restricted in any way in his proof at the bench trial, or that the district court in its findings in any way relied on the admissions; nor do we in determining that the findings are amply supported by the trial evidence and are not clearly erroneous. No reversible error is shown by counsel's questioning McAllister as to whether he had had an emotional outburst during mediation, a matter not referenced in the district findings. McAllister remaining miscellaneous complaints are all without

merit and do not warrant separate mention.

Assuming, arguendo, that # 92-2790 is properly before us and presents anything for review, under the standards of Gonzalez v. Carlin, 907 F.2d 573, 580 (5th Cir. 1990), we find no abuse of discretion by the district court or other basis on which to set aside its September 25, 1992, order.

The judgment of the district court is AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2337
Summary Calendar

WILLIS C. McALLISTER, Appellant

versus

TELXON CORPORATION, LARRY
COLLINS AND DAN SIDES, Appellees

Consolidated with
No. 92-2790
Summary Calendar

WILLIS C. McALLISTER, Appellant

versus

TELXON CORPORATION, LARRY

COLLINS AND DAN SIDES, Appellees

Appeal from the United States District

Court for the Southern District of Texas

(CA-H-88-2229)

Before GARWOOD, SMITH and DeMOSS

,Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition(s) for rehearing filed in the above case is (are) DENIED.

ENTERED FOR THE COURT:

WILL GARWOOD
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WILLIS C. McALLISTER,

Plaintiff,

v. CIVIL ACTION NO. H-88-2229

TELXON CORPORATION, et al.,

Defendants.

ORDER

Pending before this is a Motion to Withdraw as Attorney of Record (Document # 27) filed by counsel for plaintiff Willis McAllister, Gilbert Medina, Jr. ("Medina"). After having considered the motion, the submissions of the parties, and the argument of counsel in open court on February 19, 1992, the Court

determines that the motion should be denied.

The instant motion was filed on January 21, 1992. This cause has been on **the Court's docket for almost four years and the deadline for motion filing was over one year ago. This court would** entertain a motion for substitution that would not delay trial, but neither Medina nor McAllister have attempted to find substitute counsel.

Based on the foregoing, the Court ORDERS that Medina's Motion to withdraw as Attorney of Record (Document #27) is DENIED.

SIGNED at Houston, Texas, on this the 19 day of February, 1992.

DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WILLIS C. McALLISTER,

Plaintiff,

v. CIVIL ACTION NO. H-88-2229

TELXON CORPORATION, et al.,

Defendants.

O R D E R

This Court is in receipt of a Motion to Withdraw as Attorney of Record filed by counsel for the plaintiff Willis McAllister, Gilbert Medina, Jr. ("Medina"). In this second motion, Medina specifies "areas of concern" that impair his relationship with his client, plaintiff Willis McAllister

("McAllister").

As the Court noted in its denial of Medina's first motion to withdraw, this cause has been on the Court's docket for **almost four years, and the deadline for motion filing was over one year ago.** Some of Medina's concerns have been since the filing of the complaint; yet, the motions to withdraw were filed on the eve of trial. While this court would have entertain a timely motion for substitution, the Court finds that, in the interests of Justice and judicial economy, the motion should be denied.

Therefore, the Court ORDERS that Medina's second motion to withdraw is DENIED.

SIGNED at Houston, Texas, on this the 21 day of February, 1992.

DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WILLIS C. McALLISTER,

Plaintiff,

v. CIVIL ACTION NO. H-88-2229

TELXON CORPORATION, et al.,

Defendants.

O R D E R

The Court having been notified by the Mediator in the above-styled case that this action should be reactivated on the docket hereby enters the following schedule:

Joint pretrial order due: Feb. 18, 1992

Trial will be held: Feb. 25, 1992 at 10:00 a.m.

Furthermore, all prior orders of reference to Magistrate George Kelt are reinstated.

The Clerk will send a true copy to all parties. SIGNED at Houston, Texas, on this the 11 day of Jan., 1992.

DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WILLIS C. McALLISTER,

Plaintiff,

v. CIVIL ACTION NO. H-88-2229

TELXON CORPORATION, et al.,

Defendants.

RULE 16 SCHEDULING O R D E R

...4. Oct. 31, 1990 - MOTION CUT-OFF. No motion shall be filed after this date except for good cause shown. See Local Rule 6...all parties. SIGNED this 31st day of January, 1990.

DAVID HITTNER
United States District Judge

Transcribed District Court Orders

February 19, 1992 Pretrial Conference.

Page # 4, Lines # 6 thru 11:

THE COURT: "All right. This is the ruling on the motion. The motion to withdraw is denied. However, if you, Mr. McAllister, can get another attorney to substitute in prior to trial with the understanding that there will be no delay in this case, then certainly I will favorably consider the motion to withdraw.

Page # 5, Lines # 4 thru 10:

MR.MCALLISTER:"...I would like to ask this court for a continuance on this matter".

THE COURT: "That's denied. Have a seat.

Both of you all, have a seat. This case is going forward. This is Federal Court. It's a discrimination suit filed in 1988 and it's going forward. It's that simple **and it's a jury trial".**

Page # 5, Lines # 11 thru 14:

THE COURT: "Defendant's motion for summary judgment. On February 11th, I granted the defendant's motion to file an immediate late motion for summary judgment. McAllister has not responded. When will we have your response, sir?".

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Page # 3, Lines # 22 thru 25:

THE MILLER: "Your Honor, before we begin

with opening statements, there is one quick matter on request for admissions. Mr. Domozick had issued a request of admissions as part of discovery and had not received any replies...

Page # 6, Lines # 22 and 23:

THE COURT: "They're all -- under the rules, the Federal Rules, they're deemed admitted."

Page # 7, Line # 8:

THE COURT: "They're deemed admitted".

Page # 9, Line # 21:

THE COURT: "They're deemed admitted".

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT

OF TEXAS

HOUSTON DIVISION

CIVIL ACTION NO. H-88-2229

WILLIS C. McALLISTER,

Plaintiff,

versus

TELXON CORPORATION, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Willis C. McAllister ("McAllister") brought this cause of action against defendants Telxon Corporation ("Telxon"), Larry Collins ("Collins") and Dana Sides ("Sides") after he was terminated from his employment at Telxon on September 16, 1987. McAllister contends that in discharging him, Telxon and its managers, Collins and Sides, violated his rights as protected by Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. • 2000e et seq.

This cause came on four-day trial on February 25, 1992. Based upon the Testimony given at trial and the

documentary evidence admitted at trial, this court entered the following findings of fact and conclusions of law.

Findings of Fact

1. Telxon is a Delaware corporation that has its principal place of business in Akron, Ohio, and a manufacturing plant in Houston, Texas. Telxon designs , develops, markets, and services portable, interactive microcomputers systems that are used to gather, store, store, and process on-site data.

2. At all relevant times, Collins and Sides were employees of Telxon in the Houston Plant.

3. McAllister is a 37-year old black

male residing in the Houston, Texas area.

4. McAllister has a B.A. degree in accounting from Baldwin Wallace College.

5. In January 1979, McAllister began working for Coopers & Lybrand in Cleveland, Ohio.

6. In June 1981, McAllister moved to Houston.

7. In early 1984, McAllister was employed with a temporary personnel service and was placed at Telxon to perform accounting work. Collins supervised McAllister during this period

8. Telxon hired McAllister as a Junior Cost Accountant in April 1984. Collins was McAllister's supervisor.

9. **Telxon employs approx. 300 people, 52% of which are minorities.**

10. Telxon professional employees (those exempt from overtime) are **reviewed for the first time after six months of employment and subsequently, once every year.**

11. In his October 1984 six-month performance review McAllister rated above average. He made no complaints, written or oral to Hall in 1984.

12. In January 1985, McAllister complained that Terry Hogan ("Hogan") used abusive language (the word "bullshit" towards him. Peggy Hall ("Hall"), Human Resources Manager at Telxon, met with McAllister to resolve

the conflict between McAllister and Hogan. Three meetings were held as a result of this complaint in early 1985.

13. Abusive language is prohibited by the Telxon Personnel Handbook. A note was placed in Hogan's file.

14. On March 25, 1985, Collins sent McAllister a memorandum detailing six areas of McAllister's performance that needed improvement. One of the problem areas discussed was McAllister's incompatibility with fellow employees. McAllister responded to the memo in Collins for "involv[ing] [him] in this exchange."

15. In his October 1985 performance review, McAllister was rated "fully

adequate." Collins commented in the review that McAllister needed to improve "interaction with employees equal to or below his status." McAllister received a raise after this review. McAllister made no written or oral complaints to in 1985.

16. Collins wrote another memorandum on January 17, 1986, that noted McAllister's areas of unsatisfactory performance. McAllister disagreed with with the memo and initially refused to sign it.

17. On January 21, 1986, McAllister filed a written complaint against Telxon. employee Ray Leger ("Leger"). This complaint was filed four months after

the incident. McAllister alleged tnat Leger had physically assaulted him. Leger had touched McAllister's elbow to get his attention. Thereafter, when Leger walked by McAllister, McAllister sometimes would stand with his back against the wall of the hallway, arms spread, until Leger passed by. Telxon took no action against Leger.

18. In January 1986, McAllister was Transferred to the position of Materials Auditor. This was a lateral transfer. Dan Sides ("Sides"), Director of Materials Management, became McAllister's supervisor.

19. In his performance review 90-days after transfer to Materials Auditor,

McAllister was rated "fully adequate."

20. In his May 1987 annual performance review, McAllister rated "standard" in three areas and "below standard" in areas, with an overall rating of "standard." David Pagel ("Pagel"), who also supervised McAllister as Materials Auditors, completed the review late.

21. McAllister was Transferred to the position of New Products Planner on May 29, 1987. This was a lateral transfer. Sides continued to supervise McAllister.

22. In August 1987, Sides documented a verbal warning given to McAllister for unprofessional behavior at a production meeting. Sides reported that, among other things, McAllister "dis-associated

himself from meeting by turning his back to meeting table while eating sandwich."

It was not inappropriate for McAllister to eat at the meeting.

23. In September 1987, McAllister wrote a memo to Sides Stating that his accounting background did not qualify him to be New Products Planner. Hall then communicated to McAllister that he was capable of doing the job.

24. When an employee other than Sides delivered McAllister's paycheck, McAllister complained that his address (which was visible through the envelope "window") was not kept confidential.

25. McAllister was the first black professional at Telxon.

26. McAllister's complaints were filed pursuant to Telxon's policy, as set out in Telxon's employee handbook.

27. On September 14, 1987, Tony Balouch "put his hands on [McAllister's] person." McAllister complained in writing to Sides. As a result of this incident, McAllister failed to complete a priority project that Sides assigned to him earlier that day. The project should have taken only a few hours.

28. On the morning of September 15, 1987, Sides asked about the status of the assignment. McAllister handed in the assignment by 9:30 a.m. The report was given to another employee to be completed correctly.

29. The decision to terminate McAllister was made on September 15, 1987.

30. On September 16, 1987, McAllister met with Sides, Hall, and Jack Hutchinson, Telxon's Director of Personnel. McAllister was terminated at this meeting. When McAllister left meeting he stated that he would call for a police escort off the premises. The police responded to his call and escorted McAllister off the premises. McAllister also stated that he hoped to involve the FBI.

31. McAllister received a right-to-sue letter on March 31, 1988.

32. Since his termination, McAllister

was employed for two months in a permanent position with another company He was terminated under an at-will employment contract.

33. McAllister is not currently employed. He receives unemployment compensation from the Texas Employment Commission.

34. On January 21, 1986, McAllister complained that Telxon employee Mike Christie verbally assaulted him by stating that he would have the Mafia "bump [McAllister] off." This complaint was filed eight months after the incident. Christie had referred to the Mafia in jest when he found McAllister shuffling through the papers on

Christies's work bench without Christie's permission. Christie was not and is not a member of the Mafia.

Thereafter, when Christie walked by McAllister, McAllister sometimes would stand with his back against the wall of hallway, arms spread, until Christie passed by.

35. Sides provided a job description to McAllister for New Products Planner on Aug 22 1987. McAllister responded on September 10, 1987, in a written note to Sides, that he was not qualified for the position and consequently could not carry out the duties of the position successfully.

36. The Materials Auditor position was

newly-created and approved at the suggestion of Sides, and McAllister was the first person to fill that position.

37. Sides raised complaints about McAllister's performance and interaction with other employees with McAllister.

38. Sides evacuated the building on the day McAllister was terminated because Sides perceived McAllister's behavior as irrational.

39. Other managers voiced complaints made by their employees about McAllister to Sides.

40. The functions of the Materials Auditor were transferred to the accounting department. McAllister could not transfer back into accounting

because no position was opened.

41. The person in the New Products Planner position before McAllister did not have an accounting background. Her experience was in purchasing.

42. At the conclusion of the January 1985 Telxon softball game, Jeff Dornak ("Dornak"), an assembly worker at Telxon , approached McAllister, a member of the opposing team, to shake his hand and say "good game." McAllister later told Hall that Dornak assaulted him. Telxon took no action because other employees' accounts of the incident differed from had occurred off premises. McAllister never filed a formal written complaint about Dornak.

43. Approximately four desk were on the shipping area. Don Beach, the New Products Introduction Manager, used one of those desks frequently.

44. McAllister also frequently used a desk on the shipping dock when he confirmed orders using the MIS database. McAllister had a different office for regular use.

45. When McAllister transferred out of Accounting, Patty Lamb, a white female, was hired as a cost Accountant.

46. After McAllister's Termination, Harvey Nevills, a black male, filled the position of New Products Planner.

47. Any conclusion of law which should be construed as a finding of fact is

hereby adopted as such.

Conclusion of Law

1. A prima facie case of race discrimination under TiTle VII requires proof that:

(a) the employee belongs to a racial minority,

(b) the employee was qualified for the job he held,

(c) the employee was discharged, and

(d) after his discharge, the employer filled the position with a nonminority.

Coleman v. Braniff Airways, Inc., 664 F.2d 1282, 1284 (5th Cir. 1982). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

2. Once the employee establishes a

prima facie, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981); Green, 411 U.S. at 802-803.

3. Should the employer carry this burden, the employee must then prove that the legitimate reasons offered by the employer were a mere pretext for discrimination. Burdine, 450 U.S. at 256 ; Green, 411 U.S. at 804.

4. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff employee remains at all times with the plaintiff. Burine, 450 U.S. at

253.

5. The Court determines that, even if McAllister established a prima facie case, Telxon, Collins, and Sides articulated legitimate, nondiscriminatory reasons for his discharge. The legitimate, nondiscriminatory reasons include unsatisfactory job performance, unprofessional behavior, and insubordinatiom.

6. The Court finds that McAllister failed to proved by a preponderance of the evidence that the legitimate, nondiscriminatory reasons offered by Telxon, Collins, and Sides were a for any unlawful purpose.

7. Any finding of fact which should be construed as a conclusion of law is hereby adopted as such.

SIGNED at Houston, Texas, on this the 25 day of March, 1992.

DAVID HITTNER
United States District Judge

Supreme Court, U.S.
FILED
JUN 27 1996
CLERK

No. 95-1941

In The

Supreme Court of the United States

October Term, 1995

WILLIS C. McALLISTER,

Petitioner,

v.

TELXON CORPORATION, LARRY COLLINS, AND DANA R. SIDES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a Petition for Writ of Certiorari be denied where the Petitioner's Due Process Clause arguments were not raised in or addressed by the District Court or the Court of Appeals, the Respondents are not state actors, the Petitioner was afforded traditional procedures, and the case was correctly decided on the basis of its facts, not on the basis of any important legal issues?

LIST OF INTERESTED PARTIES

The Petitioner is Willis C. McAllister.

The Respondents are Telxon Corporation, Larry Collins, and Dana R. Sides. Robert A. Goodman of Goodman Weiss Miller Goldfarb is Counsel of Record for all Respondents. Daniel D. Domozick of Goodman Weiss Miller Goldfarb is also Counsel for all Respondents.

Telxon Corporation has no parent company.

Telxon Corporation has one non-wholly owned subsidiary Telxon Corporation Systems Espana, S.A.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Telxon Corporation ("Telxon"), Larry Collins ("Collins"), and Dana R. Sides ("Sides"), respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Willis C. McAllister seeking review of the decision of the United States Court of Appeals for the Fifth Circuit.

CONSTITUTIONAL PROVISIONS

Petitioner claims that the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution are implicated by this case.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition stems from a complete defense verdict, following a trial in the United States District Court for the Southern District of Texas, Houston Division, in a race discrimination case. Petitioner, who is black, complained that he was discharged in September 1987 from his employment with Telxon because of his race, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* Collins and Sides were Petitioner's supervisors at Telxon.

Petitioner filed suit in the United States District Court for the Southern District of Texas on June 29, 1988, alleging a violation of Title VII, a breach of "common law contract" and the commission of a "public policy tort." (Rec. Vol. 2, pp. 1-8). There were no allegations in the Complaint concerning any Due Process Clause violations.

The matter proceeded to a bench trial on February 25, 1992. After a four-day trial, the District Court found in favor of Respondents, holding that:

> The Court determines that, even if McAllister established a prima facie case, Telxon, Collins and Sides articulated legitimate, nondiscriminatory reasons for his discharge. The legitimate,

> nondiscriminatory reasons include unsatisfactory job performance, unprofessional behavior, and insubordination.

(App. A45).[1] Petitioner litigated his case as a Title VII action, not as a Due Process Clause violation action. (App. A27, A43-A46).

Petitioner then appealed the District Court's judgment to the United States Court of Appeals for the Fifth Circuit. On August 25, 1994, the Fifth Circuit unanimously affirmed in all respects the District Court's judgment. The Fifth Circuit held that:

> The district court made detailed findings of fact and conclusions of law, which plainly exonerate defendants for the Title VII violation of racial discrimination as to McAllister. . . . The district court's findings, which preclude any recovery by McAllister on any pleaded theory, are amply supported by the trial evidence, and McAllister has not demonstrated that they are clearly erroneous.

(App. A5-A6). Petitioner failed to argue to the Fifth Circuit that the Respondents or the District Court violated any Due Process Clause rights.

Petitioner then filed an apparently timely but defective Writ of Certiorari with this Court. The defective Writ was returned to Petitioner on or about December 29, 1994 where it sat until Petitioner re-filed his Writ of Certiorari on or about May 31, 1996.

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[1] All Appendix citations are to the Appendix in the Petition for Writ of Certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a review of a Petition for a Writ of Certiorari is not a matter of right, but of judicial discretion. No special or important reasons exist in this case warranting the granting of the Writ of Certiorari, and Petitioner has identified none. First, Petitioner's entire Writ is premised on Due Process Clause violations, a theory he neither has pled nor argued below. Second, the Respondents are not state actors and thus are not subject to the Due Process Clause. Third, to the extent that Petitioner is arguing that the District Court, and not the Respondents, violated his Fifth and Fourteenth Amendment rights, this claim, too, is completely meritless. Petitioner was afforded traditional procedures and a substantively correct decision implicates no constitutional rights. Finally, Petitioner has not, and cannot, identify a conflict with any decision of a United States Court of Appeals or this Court on any of the issues adjudicated below. The District Court and the Fifth Circuit simply applied existing, established precedent to the facts of this case. Petitioner had his day in court. Therefore, this Court, in its discretion, should deny the Petitioner's Writ of Certiorari.

I.

THE PURPORTED DUE PROCESS CLAUSE VIOLATIONS ARE WITHOUT MERIT

From the "Questions Presented" through his "Conclusion," Petitioner argues that the Respondents and/or

the District Court violated his rights to Due Process under the Fifth and Fourteenth Amendments.

Petitioner conveniently does not mention that he neither pled nor argued this theory below. On this basis alone, Petitioner's failure to plead or argue a constitutional theory to the courts below is generally fatal to his claim. *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Even had Petitioner argued that Respondents violated his Due Process rights (which he did not), it is well established that the Fifth and Fourteenth Amendments apply only to actions by the federal government and/or the state, not private parties. *Carpenter v. Scott*, 463 U.S. 825, 831 (1983) ("The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals. This has been the view of this Court from the beginning. It remains the Court's view today.") (citations omitted); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 644 (1991) (O'Connor dissenting) ("The Fifth Amendment's Due Process Clause prohibits only actions for which the Government can be held responsible."). Indeed, "[r]acial discrimination, although repugnant in all contexts, violates the constitution only where it is attributable to state action." *Georgia v. McCollum*, 505 U.S. 42, 50 (1992).

Nor has Petitioner ever claimed or demonstrated that Respondents and the state were in a symbiotic relationship, *see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972), or that the state had encouraged or facilitated the alleged discrimination. *See Edmonson, supra*, 500 U.S. at 624.

To the extent that Petitioner is arguing that the District Court denied him Due Process, Petitioner's claim is meritless. The District Court afforded Petitioner traditional procedures. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470-471 (1993) (Scalia concurring). Moreover, substantively correct decisions implicate no constitutional rights. *TXO, supra*, 509 U.S. at 470-471. Petitioner's constitutional claims have no merit.

II.

NO IMPORTANT LEGAL ISSUE OR OTHER REASON JUSTIFIES GRANTING THE PETITION

Petitioner has not identified any conflict between the Fifth Circuit's decision here and any other decision by another Court of Appeals or this Court. Nor has there been any showing pursuant to Rule 10 that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Petitioner's Title VII claim was the subject of a four-day trial. The District Court then produced lengthy, detailed Findings of Fact. The District Court utilized the standards set forth in established precedents of this Court, *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in determining that no Title VII violation occurred. In fact, the record is replete with instances of Petitioner's bizarre, unprofessional and hostile behavior that made his employment with Telxon simply unacceptable. (*See, e.g.*, 4th Supp. Rec. Vol. 5, p. 77 – Petitioner

stated that he had "hate, resentment and fear towards some whites," "irrational thoughts about hurting people, physically" and "phobias (at times) towards whites in offices"; 4th Supp. Rec. Vol. 5, pp. 71, 77, 87-89, 98-99 – Petitioner's wild accusations of murder plots and other criminal activity against Respondents).

In affirming the District Court's determination of Petitioner's Title VII claim, the Fifth Circuit likewise utilized established precedent in affirming the judgment in favor of Respondents. (App. A5-A6). Thus, the decisions by the District Court and the Fifth Circuit rest largely on the basis of the facts adduced at trial – which were clearly insufficient to establish a Title VII claim. A case that fails to prove a Title VII claim because of a paucity of facts presents no issue deserving of this Court's attention. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *adhered to in part*, 339 U.S. 605 (1950) ("A court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

Petitioner's other claims likewise deserve no attention from this Court. All of these other issues were correctly decided by the courts below.

As to Petitioner's claim that he was denied a jury trial of his Title VII claim, the Record is clear that Petitioner *never requested* a jury trial. (App. A7). The Record is also clear that Petitioner *never objected* to a bench trial. In any event, the jury trial provision in the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a), does not apply to cases

arising before the statute's enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

Petitioner also claims that his motion for a continuance of trial and his counsel's motions to withdraw were improperly denied. Such motions are committed to the sound discretion of the District Court. *See Morris v. Slappy*, 461 U.S. 1, 11 (1983) ("broad discretion must be granted trial courts on matters of continuances"); *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087 (7th Cir. 1982) (a decision on motion to withdraw will be reversed on appeal only when the trial court has abused its discretion); *Huang v. The Bd. of Governors*, 902 F.2d 1134, 1142-1143 (4th Cir. 1990) (same). The District Court's orders here amply support this discretion in denying the motions. (App. A14-15, A17-81, A23-24). Likewise, the Fifth Circuit determined that "[n]either motion to withdraw presented grounds which compelled or required withdrawal, and under the circumstances, no abuse of discretion by the district court is demonstrated as to the motions to withdraw and the motion for continuance." (App. A9). Moreover, Petitioner presents no argument or case law citation demonstrating any error below.

Finally, Petitioner's claims that Requests for Admissions wrongfully were deemed admitted against him is erroneous. On the first day of trial, and prior to opening argument, the District Court properly deemed admitted Telxon's Requests for Admissions directed to Petitioner. (4th Supp. Rec. Vol. 3, pp. 3-9).

Even if the District Court erred in admitting the Requests for Admissions, such error was certainly harmless. The District Court could have granted, but chose not

to, Respondents' Summary Judgment Motion on the basis of the Requests for Admissions alone. Instead, the District Court held a lengthy four-day trial in which Petitioner was provided his day in court. Moreover, the District Court's Findings of Fact and Conclusions of Law do not mention or rely upon any of the admissions in this matter. There was ample evidence in the record from which the District Court and the Fifth Circuit determined that no discrimination of any kind whatsoever was directed at Petitioner. (App. A10).

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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